

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

LONE STAR STEAKHOUSE AND )  
SALOON, INC. AND LONE STAR )  
STEAKHOUSE AND SALOON OF )  
MICHIGAN, INC., )

Plaintiffs, )

VS. )

CASE NO. 02-1185-WEB

LIBERTY MUTUAL INSURANCE )  
GROUP AND LIBERTY MUTUAL )  
FIRE INSURANCE COMPANY, )

Defendants. )

**MEMORANDUM AND ORDER**

\_\_\_\_\_ The court now considers a motion to compel discovery by defendants Liberty Mutual Insurance Group and Liberty Mutual Fire Insurance Group (Liberty Mutual). (Doc. 38.) Liberty Mutual seeks an order compelling plaintiffs Lone Star Steakhouse & Saloon, Inc. and Lone Star Steakhouse and Saloon of Michigan, Inc. (Lone Star) to respond to various interrogatories and requests for production of documents. Lone Star has filed a response (Doc. 44), in which it states that all Liberty Mutual's discovery requests at issue in this motion have

been satisfied. Liberty Mutual filed an untimely reply. (Doc. 47.) Liberty Mutual's motion (Doc. 38) is GRANTED in part, and DENIED in part, for reasons set forth herein.

### **BACKGROUND**

Lone Star operates a restaurant in Battle Creek, Michigan. As a part of the construction of the restaurant, Lone Star maintained a water storage basin on its property to handle storm water run-off from the restaurant property. Battle Creek Hospitality, Inc. (Battle Creek) operated a Holiday Inn Express on the property next to Lone Star's restaurant.

In 1998, Battle Creek filed suit against Lone Star alleging that overflow from the water basin damaged its property ("1998 case"). Liberty Mutual defended Lone Star in the initial action. The 1998 case was settled for \$95,000 and Liberty Mutual paid the full amount of the settlement.

On January 21, 2000, shortly after the settlement of the 1998 case, Battle Creek filed a second action ("2000 case") against Lone Star alleging nuisance and trespass for additional flooding incidents, seeking damages in excess of \$6,000,000. Once again, Liberty Mutual defended Lone Star. Liberty Mutual sent reservation of rights letters to Lone Star indicating that there were questions about coverage under their insurance policy.

Shortly before a settlement conference set in the 2000 case, Liberty Mutual advised Lone Star that it was only willing to contribute a maximum of 20% of any settlement amount up to \$750,000 (*i.e.*, a maximum of \$150,000). The settlement conference proceeded on May 7, 2002, but no settlement was reached. Lone Star later settled the 2000 case with Battle Creek for \$890,000.

On May 30, 2002, Lone Star filed this action alleging in Count I that Liberty Mutual's failure to contribute to the settlement of the 2000 case resulted in a breach of their contract of Commercial General Liability Insurance. Lone Star also claims in Count II that by wrongfully denying their claim, Liberty Mutual is liable for a "bad faith" breach of its duty of good faith and fair dealing, and is further liable for punitive damages.

Liberty Mutual filed the instant motion seeking to compel Lone Star to produce various documents and respond to interrogatories. (Doc. 38.) Lone Star was granted an extended time to respond because the parties were working to resolve their differences on the disputed discovery requests. Ultimately, Lone Star's response indicated that "virtually all issues" concerning Liberty Mutual's motion to compel had been resolved. (Doc. 44 at 1.) Liberty Mutual's reply time expired on May 7, 2003. *See* D.Kan. Rule 6.1(e). Notwithstanding that fact,

Liberty Mutual filed a reply on May 8, 2003. (Doc. 47.)<sup>1</sup>

### **LIBERTY MUTUAL'S FIRST REQUEST FOR DOCUMENTS**

#### *Requests 5, 6, 7, and 14*

Requests for Production of Documents (RPD) 5, 6, and 7 all sought information exchanged between Lone Star and Battle Creek during the discovery phase of the underlying 2000 case. (Doc. 47 at 2.) Lone Star contends that it has produced all responsive documents to the extent they are in its “possession, custody or control.” (Doc. 44 at 2.) However, Liberty Mutual maintains that no responsive documents have been provided. (Doc. 47 at 2.)

Similarly, RPD 14 seeks color laser copies or photo reprints of photos used in the 2000 case. (Doc. 47 at 2.) Lone Star responds that it has delivered all colored pictures fitting the RPD 14 description that are in its possession, custody, or control. (Doc. 44 at 2.) However, Liberty Mutual contends that Lone Star has produced no responsive photos from Battle Creek’s Motion for Temporary Injunction in the 2000 case. (Doc. 47 at 3.)

A party may be required to produce relevant documents and tangible things

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<sup>1</sup> Because Lone Star has not objected to the untimely filing, the court will consider Liberty Mutual’s reply in ruling on the motion.

that are within its “possession, custody or control.” Fed. R. Civ. P. 34(a).

“‘[C]ontrol’ comprehends not only possession but also the right, authority, or ability to obtain the documents.” *Comeau v. Rupp*, 810 F. Supp 1127, 1166 (D. Kan. 1992); *see also McCoo v. Denny’s, Inc.*, 192 F.R.D. 675, 692 (D. Kan. 2000); *Pulsecard, Inc. v. Discover Card Servs., Inc.*, 168 F.R.D. 295, 307 (D. Kan. 1996). Hence, Rule 34(a) may require a party to produce documents beyond its actual possession when it retains any right or ability to influence the person in whose possession the documents lie. Particularly relevant to this case, Lone Star is deemed to have control over documents held on its behalf by Lone Star’s attorneys. *See In re Ruppert*, 309 F.2d 97, 98 (6<sup>th</sup> Cir. 1962); *Henderson v. Zurn Indus., Inc.*, 131 F.R.D. 560, 567 (S.D. Ind. 1990) (quoting 8 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2210 at 621 (1984)). Therefore, Lone Star is obliged to produce all responsive, unprivileged documents held by its attorneys, including those held by the firm of Plunkett & Cooney. Lone Star has indicated in letters to Liberty Mutual that it has requested such documents from Plunkett & Cooney (Doc. 44 exhs. A, B); however, Lone Star cannot fulfill its obligations by mere requests. Instead, Lone Star is affirmatively obliged to produce all responsive documents, even those held by its attorneys.

Ordinarily, a sworn statement that a party has no more documents in its

possession, custody, or control is sufficient to satisfy the party's obligation to respond to a request for production of documents. *See McCoo*, 192 F.R.D. at 692; *Pulsecard*, 168 F.R.D. at 307; *Milner v. Nat'l Sch. of Health Tech.*, 73 F.R.D. 628, 632-33 (D. Pa. 1977); *cf. Norman v. Young*, 422 F.2d 470, 472-73 (10<sup>th</sup> Cir. 1970) (discussing requests for production of documents under Rule 34, as it existed prior to the 1970 amendments). However, RPD 5, 6, 7, and 14 involved document requests related to the recent, underlying 2000 case. Moreover, Lone Star has failed to deny that it had the relevant documents during the 2000 case. *See* Doc. 44 at 2 (Lone Star affirmatively states that RPD 8 and 9 were never answered and that the desired documents did not exist. Conversely, Lone Star makes no such statement regarding RPD 5, 6, and 7). On the contrary, Lone Star has delivered papers to Liberty Mutual which reference some of the relevant documents as attachments or appendices, but the actual documents were not attached or appended. (Doc. 38 at 3-4.) Similarly, Lone Star was copied on correspondence whereby Battle Creek provided the state court with color photos responsive to RPD 14 in the 2000 case. (Doc. 47 exh. F at 1) (indicating that A. Benjamin Henson, an attorney for Plunkett & Cooney, was copied on the correspondence). Accordingly, it seems apparent that Lone Star *did* have the relevant documents during the 2000 case.

In a case where documents sought under Rule 34 are known to have been in a party's possession, it seems fundamentally unfair to permit the party resisting production to simply declare that the documents are no longer in the party's possession, custody, or control. The documents did not vanish into thin air. Something happened to them. Perhaps they were delivered to someone else. Maybe they were destroyed. Regardless, the requesting party is entitled to some explanation regarding final disposition of the desired papers. *See Buchanan v. Consol. Stores Corp.*, 206 F.R.D. 123, 125 (D. Md. 2002); *see also Hansel v. Shell Oil Corp.*, 169 F.R.D. 303, 305 (E.D. Pa. 1996); *Milner*, 73 F.R.D. at 632. Only in this manner may the requesting party determine whether to search elsewhere, or whether the only existing copies were destroyed, thus making further search futile.

Although Lone Star denies that any responsive documents are in its "possession, custody or control" (Doc. 44 at 2), the record is unclear as to whether Lone Star has clearly made that statement in its responses to RPD 5, 6, 7, and 14. Accordingly, Lone Star is ORDERED to supplement its responses to RPD 5, 6, 7, and 14, producing any responsive documents. In so doing, Lone Star shall consider the broad definition of control, as described *supra*. Furthermore, Lone Star is ORDERED to supplement its responses to RPD 5, 6, 7, and 14 for any

potentially responsive documents that it had in its possession, custody or control during the 2000 case, but which Lone Star presently does not have in its possession, custody or control, as follows:

1. For any documents transferred to someone outside Lone Star's possession, custody, or control, identify the person to whom transferred.
2. For any documents destroyed, identify when and why they were destroyed.
3. For any documents for which Lone Star cannot otherwise account, describe the efforts to which Lone Star went to find the documents.
4. Certify in the response that Lone Star has no more responsive documents in its possession, custody, or control.

#### *Requests 15 and 16*

Through RPD 15 and 16, Liberty seeks various types of correspondence between Lone Star, Lone Stars attorneys, and Liberty Mutual regarding the 1998 and 2000 cases. (Doc. 38 at 3.) Lone Star responded that it had produced all responsive documents. (Doc. 44 at 2.) Liberty Mutual notes that Lone Star has produced a file from a Lone Star employee regarding the 1998 case, but not for the 2000 case. (Doc. 47 at 3.)



Like the circumstances surrounding RPD 5, 6, 7, and 14, these facts suggest a strong likelihood that Lone Star created a similar file for the 2000 case. Equity and fairness require that Liberty Mutual receive some explanation for the lack of responsive documents pertaining to the 2000 case. Therefore, Lone Star is ORDERED to supplement its response to RPD 15 and 16 as follows:

1. For any documents transferred to someone outside Lone Star's possession, custody, or control, identify the person to whom transferred.
2. For any documents destroyed, identify when and why they were destroyed.
3. Describe the efforts to which Lone Star went to find responsive documents.
4. Certify in the response that Lone Star has no more responsive documents in its possession, custody, or control.

### **LIBERTY MUTUAL'S SECOND SET OF INTERROGATORIES**

The only issue still outstanding with regard to Liberty Mutual's second set of interrogatories is Lone Star's response to interrogatory number (IROG) 2. (Doc. 47 at 4.) That question probes Lone Star's consideration of alternative methods in dealing with the water management problems at the Lone Star site. *Id.*

In particular, it seeks descriptions of alternatives considered, relevant dates, contact information for other persons involved in the project, and relevant documents pertaining thereto. *See id.* Lone Star responded by saying “[w]hile its contractors may have considered other methods, Lone Star generally followed the recommendations of its contractors regarding the methods used in controlling the water on the subject property.” (Doc. 38 exh. E at 5.) Lone Star went on to name those contractors, and referred Liberty Mutual to unspecified documents “relating to the work performed by” the contractors. *Id.*

Under Fed. R. Civ. P. 33, parties are permitted to serve interrogatories on each other. In limited situations, a party may produce business records in lieu of a formal answer to the interrogatory. Fed. R. Civ. P. 33(c). However, this option should be limited to times when the answer requires a “burdensome or expensive” search of the interrogated party’s business records, *id.* advisory committee’s notes, 1970 amendment, Subdivision (c), and the burden of obtaining the answer is substantially the same for both parties. Fed. R. Civ. P. 33(c). Here, Lone Star incorrectly referred Liberty Mutual to documents previously produced regarding work performed by various contractors. (Doc. 38 exh. E at 5.) Lone Star’s actions were improper because this is not the type of situation where producing business records is an option. Obtaining the answer to the interrogatory would not have

been so “burdensome or expensive” for Lone Star as to justify resort to producing documents. Accordingly, Lone Star was obligated to answer the question.

Unfortunately, the answer Lone Star provided was also unsatisfactory. Its response was highly equivocal, stating that Lone Star “generally followed the recommendations of its contractors.” *Id.* The interrogatory did not ask what Lone Star *generally* did. Instead, the question asked for specifics on “any method considered but not used.” *Id.*

While Lone Star’s response to the motion indicates “there were no additional ‘methods considered but not used’” (Doc. 44 at 3), no sworn response to IROG 2 makes such a clear statement. Accordingly, Lone Star is ORDERED to supplement its response to IROG 2, either answering the questions as presented, or clearly stating that no additional methods were considered.

Lone Star is further ORDERED to supplement its answer to IROG 2 by providing the contact information sought in IROG 2(c) as it pertains to any of the contractors on whom Lone Star relied to consider methods for water management at the project site on Lone Star’s behalf. However, Lone Star need not make any

further response to IROG 2(d), as that is a request for documents, which is not authorized by Rule 33.

**IT IS SO ORDERED.**

Dated at Wichita, Kansas, on this 4<sup>th</sup> day of June, 2003.

s/ Donald W. Bostwick  
DONALD W. BOSTWICK  
United States Magistrate Judge